U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 5 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel M Florio
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5.[1] The motions will be granted, and the prior decision dismissing the appeal shall be affirmed.

The petitioner is a computer consulting and software business. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On motion, the petitioner submitted copies of certificates of company mergers, corporate financial statements, corporate bank account statements, and corporate tax returns. The AAO finds that this constitutes new facts and evidence under 8 C.F.R. § 103.5(a)(2). Therefore, the motion is granted.

As set forth in the director's decision dated April 22, 2008 and the AAO's decision dated April 25, 2012, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Based upon the evidence in the record, the AAO has determined that the petitioner demonstrated its ability to pay the proffered wage in 2009, 2010, and 2011. However, the petitioner has failed to demonstrate its ability to pay the proffered wage in 2004, 2005, 2006, 2007, and January 2008 through June 2008. The petitioner asserts that it has established its ability to pay the proffered wage in those years.

Therefore, on motion the primary issue is whether the petitioner has established its ability to pay the proffered wage for 2004, 2005, 2006, 2007, and January to June, 2008.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

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[1] The AAO notes that [redacted] was the actual entity that filed the current motions on Form I-290B, Notice of Appeal or Motion. [redacted] has failed to establish that it is a successor-in-interest to the petitioner and any of the petitioner's other successors-in-interest. This issue must be addressed in any future filings. The AAO will recognize these motions as having been filed by the petitioner rather than by [redacted]

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on December 9, 2004. The proffered wage as stated on the Form ETA 750 is $74,672.00 per year. The Form ETA 750 at part 14 states that the position requires a bachelor's degree in engineering, math, computer science, or MIS and 5 years of experience in the job offered or 5 years of experience in a related occupation, programmer analyst.

The petitioner indicates on the Form I-140 that it was established on August 26, 2004, and that it currently employs 38 workers. On the Form ETA 750, signed by the beneficiary May 4, 2007, the beneficiary does not claim to have been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On motion, the petitioner asserts that the decision of the AAO was in error and that it has demonstrated its ability to pay the proffered wage in the relevant years. As noted in the AAO's

decision, although the petitioner asserts that it, and are both S corporations, and are owned by the same shareholders and officers, and share the same address, the financial resources of both business entities will not be considered in determining the petitioner's ability to pay the proffered wage since the priority date. The evidence in the record of proceeding shows that merged with . as of January 2007, and that merged with in June 2008; therefore, evidence of financial resources alone will be considered until June 2008,[2] and the financial resources of will be considered from June 2008, onward. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The record of proceeding shows that merged with . in January 2007. As did not merge with until June 2008, its financial resources prior to that date will not be considered in evaluating the petitioner's ability to pay the proffered wage.

USCIS rejects the idea that a shareholder's assets, including their income, should have been considered in the determination of the ability to pay the proffered wage. USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. As noted above, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530, and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders, including real estate values, rental income, or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, the financial resources of the two business entities will only be considered as noted above, and will not be combined.

On motion, the petitioner asserts that since it has paid the beneficiary at the proffered wage rate since 2006 according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). The petitioner asserts that Mr. Yates makes a clear distinction between past and current salaries and since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the

[2] The petitioner did not provide any evidence to demonstrate that paid wages to the beneficiary or that it had the financial ability (net income or net current assets) to pay the proffered wage between January 2007 and June 2008

proffered wage," the petitioner urges USCIS to consider the wage rate paid in 2006 as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

The Yates' Memorandum relied upon by the petitioner provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO adjudicates appeals in accordance with the Yates Memorandum. However, the petitioner's interpretation of the language in that memorandum is broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as the petitioner urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is December 9, 2004. Thus, the petitioner must show its ability to pay the proffered wage not only in 2006, when the petitioner claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2004, 2005 and thereafter.

Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. Regardless, the record of proceeding contains copies of the petitioner's Forms 1120S for 2004, 2005, 2006, and 2007, which indicate Federal Employer's Identification Number (FEIN) Whereas, copies of Forms W-2 issued in 2005, 2006, and 2007 to the beneficiary by indicate its FEIN of . The wages were issued to the beneficiary prior to June 2008 (pre-merger); and therefore, cannot be considered in determining the petitioner's ability to pay the proffered wage in those years.

On motion, the petitioner asserts that it has enough funds in its corporate bank account to cover the prorated proffered wage amount for 2004, and that the beneficiary's wages should be prorated for the period December 9, 2004 through December 31, 2004. Contrary to the petitioner's claim, USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

The petitioner's reliance on the balances in its bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to

illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

The petitioner asserts on motion that based upon the prorated salary amount received by the beneficiary from and the petitioner's bank account balance in 2005, it has established its ability to pay the proffered wage in that year. Contrary to the petitioner's claim, as noted above, the wages paid to the beneficiary by will not be considered in determining the petitioner's ability to pay the proffered wage in that year. Likewise, the 2005 wage amount will not be prorated and the petitioner's bank statements cannot be considered for the reasons stated above.

The petitioner contends that based upon criteria found in the Yates Memo, the partnership income (net income and net current assets of) exceeds the proffered wage amount in 2006. However, as noted above, evidence of the petitioner's ability to pay the proffered wage in one year is insufficient to demonstrate its ability to pay the proffered wage as of the priority date, and the petitioner's suggestion that USCIS consider income amounts from is misconstrued based upon the merger date in June 2008. Likewise, the Forms W-2 issued by to the beneficiary in 2006 and 2007, pre-merger, will not be considered in assessing the petitioner's ability to pay the proffered wage.

The proffered wage in this matter is $74,672.00. The petitioner must establish that it could pay this wage from the priority date in 2004. 8 C.F.R. § 204.5(g)(2). USCIS may not ignore a term of a labor certification. *See Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 406 (Comm. 1986). The evidence in the record, and as noted in the AAO's initial decision, demonstrates the following:

- In 2004, the Form 1120S stated net income of -$24,708.00.
- In 2004, the Form 1120S stated net current assets of $2,943.00

- In 2005, the Form 1120S stated net income of -$4,799.00.
- In 2005, the Form 1120S stated net current assets of $595.00.

- In 2006, the Form 1120S stated net income of $17,761.00.
- In 2006, the Form 1120S stated net current assets of $23,452.00.

- In 2007, the Form 1120S stated net income of $51,071.00.
- In 2007, the Form 1120S stated net current assets of $65,255.00.

It is noted that the record of proceeding does not contain a copy of the petitioner's (tax return for 2008. Therefore, for the years 2004, 2005, 2006, 2007, and 2008, the petitioner has failed to establish its ability to pay the proffered wage to the beneficiary through its net income or net current assets.

Although the petitioner asserts that there has been an increase in his profits, it is insufficient to demonstrate the petitioner's ability to pay the proffered wage in the relevant years. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The assertions and the evidence presented on motion cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, and as noted by the AAO in its April 25, 2012 decision, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant time period. Accordingly, the

evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

ORDER: The AAO's prior decision, dated April 25, 2012, is affirmed. The petition remains denied.

cc: